



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC SUIT NO. 1079 OF 2016

JACKTONE NYENDE OBUYU.....PLAINTIFF

VERSUS

PENINA MBITHE MBITHI.....1ST DEFENDANT

MBUKONI HOLDINGS LIMITED.....2ND DEFENDANT

RULING

What is before the court for determination is the plaintiff's Notice of Motion application dated 2nd September, 2016 seeking a temporary injunction to restrain the 1st defendant from interfering in any way with the plaintiff's ownership and quiet possession of all those parcels of land known as Plot Numbers 244, 245, 246, 247, 252, 253, 254 and 255 excised from Plot No. 439 situated in Joska Selele area off Kangundo road which the 1st defendant has claimed to be part of land parcel number Mavoko Town Block 3/6091. The application is supported by the plaintiff's affidavit sworn on 2nd September, 2016.

The plaintiff's case as set out in the said affidavit is as follows. On 23rd June, 2003, he bought Plot Numbers 244, 245, 246, 247, 252, 253, 254 and 255 (hereinafter referred to as the suit properties) at a consideration of Kshs. 15,000/- per plot from the 2nd defendant which plots were to be excised from L.R No. 439 Machakos. Upon payment of the full purchase price, he was issued with ownership and beacon certificates dated 17th October 2003 by the 2nd defendant pending transfer and issuance of titles in his name. He thereafter built a residential house, fenced the suit properties and applied for electricity connection which was installed in 2015.

He has averred that on 29th January, 2016, officers from Kenya Power & Lighting arrived at his home armed with a court order issued in Nairobi HCCC No. 215 of 2015 and disconnected his electricity supply. He has averred that his quiet possession of the suit properties was once again interrupted in April 2016 when the 1st defendant while accompanied by a group of about 30 people, commenced fencing off about 20 acres of land which included the suit properties. He has averred that on 25th July, 2016 and 16th August, 2016, the 1st defendant once again invaded his home while in the company of the area chief, armed police officers and rowdy boys and proceeded to cut down his fence. Further, that on 17th and 24th August, 2016, the 1st defendant sent surveyors to the suit properties who proceeded to subdivide the same into several portions while threatening him with eviction. He has averred that he will suffer irreparable loss and damage if evicted from his matrimonial home on the suit properties. The 2nd defendant filed a replying affidavit sworn by its director, Thomas Maingi Wambua on 10th December, 2016 in support of the application.

The application is opposed by the 1st defendant through a Notice of Preliminary Objection dated 4th October, 2016 and a replying affidavit filed on the same date. In the Notice of Preliminary Objection, the 1st defendant has contended that the plaintiff had filed a similar suit and application in Machakos HCCC No. 28 of 2015, Winnie Nyambura & 75 others v Peninah Mbithe Mbithi and as such the suit and application before the court are incompetent, misconceived and amount to gross abuse of the court process. The 1st defendant has contended further that the suit and the application are bad in law, frivolous, vexatious and scandalous.

In her replying affidavit, the 1st defendant has stated that she is the sole and absolute registered proprietor of the parcel known as Mavoko Town Block 3/6091 which after subdivision into 144 plots gave rise to the parcels of land known as L.R No. Mavoko Town Block 3/49715-49858. The 1st defendant has averred that the plaintiff is a victim of the 2nd defendant's fraud. The 1st defendant has averred that the plaintiff purported to purchase land from the 2nd defendant without seeing the title document for the land or conducting a search on the title thereof. The 1st defendant has averred that she made the plaintiff aware of her ownership of the suit properties in 2007 before the plaintiff constructed a semi-permanent structure thereon. The 1st defendant has reiterated that the plaintiff had filed a similar suit in Machakos namely Machakos HCCC No. 28 of 2015. The 1st defendant has averred that the plaintiff cannot claim to be an adverse possessor of the suit properties as well a purchaser thereof at the same time. The 1st defendant has averred that the plaintiff is undeserving of the discretionary reliefs sought as he is

guilty of material non-disclosure. The 1st defendant has averred further that the plaintiff's remedy lies in pursuing the 2nd defendant for the recovery of monies allegedly paid to it by the plaintiff for the suit properties.

On 21st September, 2017, the court directed that the plaintiff's application and the 1st defendant's Notice of Preliminary Objection be heard together by way of written submissions. The plaintiff and the 2nd defendant did not file their submissions even after being given more time to do so. The 1st defendant filed her submissions on 13th November, 2017. The 1st defendant has submitted that the averments in her replying affidavit were not rebutted by the plaintiff. The 1st defendant has submitted that the plaintiff's application which was brought in a suit filed in gross abuse of the court process while there was in existence a similar suit before the High Court at Machakos is a candidate for dismissal.

The 1st defendant has submitted that the plaintiff committed perjury by deposing that there were no other proceedings between him and the defendants over the same subject matter which renders the application and the suit unsustainable. The 1st defendant has submitted further that the plaintiff's suit was brought in bad faith and through non-disclosure of material facts which disentitles the plaintiff to the injunctive orders sought. In support of her submissions, the 1st defendant has cited the cases of Giella v. Cassman Brown & Co. Ltd (1973)E.A 358 and Kenya Commercial Finance Co. Ltd v. Afraha Education Society EA (2001)1E.A 86.

Determination:

As I have stated earlier in this ruling, I have before me for determination the 1st defendant's Notice of Preliminary Objection seeking the striking out of the plaintiff's suit and the plaintiff's injunction application. I will deal with the preliminary objection first and then go to the application should it become necessary. The 1st defendant has contended that the plaintiff brought this suit while there was a similar suit pending at the High Court in Machakos between the parties namely, Machakos HCCC No. 28 of 2015, Winnie Nyambura & 75 others v. Peninah Mbithe Mbithi and Mbukoni Holdings Limited (hereinafter referred to only as "the Machakos case") over the same subject matter. This issue was raised by the 1st defendant in her Notice of Preliminary Objection and replying affidavit. The plaintiff did not rebut this contention. A list of 75 claimants attached to the plaint that was filed in the Machakos case annexed to 1st defendant's replying affidavit shows that the plaintiff herein was claimant No. 66 in that suit. In the Machakos case, the plaintiffs in that case sought the following reliefs against the defendants herein:

- 1. A declaration that the plaintiffs are the lawful owners of all that parcel of land otherwise known as Mavoko Town Block 3/6091.**
- 2. An order directed at the 2nd defendant to transfer or cause to be transferred the said parcel of land into the names of the plaintiffs.**
- 3. A permanent order of injunction stopping the defendants, their agents or servants from entering or demolishing any structures or in any way dealing with land parcel no. Mavoko Town Block 3/6091 within Lukenya area.**
- 4. Any other remedy this court finds just to grant.**
- 5. Costs and interest.**

In his plaint filed herein, the plaintiff is seeking among others, a declaratory order that he is the owner of plot numbers 244, 245, 246, 247, 252, 253, 254 and 255 excised from Plot No. 439, in Joska Selele area off Kangundo road (the suit properties) being claimed by the 1st defendant as part of Mavoko Town Block 3/6091 and a permanent injunction restraining the 1st defendant from interfering with his possession of the aforesaid properties. There is no doubt that as between the plaintiff and the defendants herein, the present suit raises the same issues as those raised in the Machakos case. The reliefs sought in the present suit are also similar to those sought in the Machakos case. Section 6 of the Civil Procedure Act bars the court from entertaining a suit where the matter in issue is also directly and substantially in issue in a previously instituted suit between the same parties. The section provides as follows:

"No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed."

In the case of Republic v Chairman District Alcoholic Drinks Regulation committee & 4 others ex parte Detlef Heier & another [2013] eKLR Angote J. faced with a similar situation as in the present case stated as follows:

"A party who wishes to file a suit which is similar to an existing suit must withdraw the first suit first. This Court cannot allow parties to be filing a multiplicity of suits on the basis that they have found the previous suit(s) wanting either in content or form. The Court must and should invoke its inherent jurisdiction to stop such abuse of the Court process."

I am fully in agreement with this statement. In the absence of any explanation from the plaintiff as to why he chose to file this suit while a similar suit was pending in Machakos, the 1st defendant's contention that the plaintiff was out to abuse the process of the court cannot be resisted.

The upshot of the foregoing is that the 1st defendant's preliminary objection dated 4th October, 2016 is upheld. The plaintiff's suit together with the Notice of Motion dated 2nd September, 2016 is struck with costs to the 1st defendant as an abuse of the process of the court.

Delivered and Dated at Nairobi this 20th day of December 2018

S. OKONG'O

JUDGE

Ruling read in open court in the presence of:

Mr. Mulako h/b for Mr. Namada for the Plaintiff

Mr. Viaki h/b for Mr. Kitonga for the 1st Defendant

Catherine-Court Assistant